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No. 22

In the Supreme Court of the United States

OCTOBER TERM, 1960

PETER CHAUNT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (R. 91-98)[1] is reported at 270 F. 2d 179. The findings of fact and conclusions of law of the district court (R. 80-90) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1959 (R. 98-99). The petition for a writ of certiorari was filed on December 16, 1959, and was granted on February 29, 1960 (R. 99; 362 U.S.

[1] "R." refers to the printed record prepared under the supervision of the Clerk of this Court. The original record, on file with the Clerk, is in ten numbered volumes. References thereto will be indicated by "Tr.", preceded by the volume number.

901). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a denaturalization judgment may be based on a ground alleged in the complaint but not referred to in the affidavit of good cause required to be filed with the complaint, where the affidavit does refer to a ground which shows that the action was not irresponsibly brought.

2. Whether an applicant for naturalization who falsely states, in reply to a specific question in the naturalization proceedings, that he has never been arrested, and who thereby blocks an avenue of inquiry by the government into the question of his moral character and eligibility for citizenship, conceals and falsifies a material fact within the meaning of the statute directing the revocation of citizenship procured through this means.

3. If either of the foregoing questions is answered favorably to petitioner, whether the judgment of denaturalization should be sustained on the basis of petitioner's fraudulent concealment of his Communist Party membership.

STATUTE INVOLVED

Section 340(a) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 260, as amended, 68 Stat. 1232,[2] 8 U.S.C. 1451(a), provides in pertinent part:

> It shall be the duty of the United States attorneys for the respective districts, upon affidavit

[2] The amendment substituted "United States attorneys" for "United States district attorneys" in the quoted excerpt.

showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title [8 U.S.C. 1421(a), designating the courts having jurisdiction to naturalize] in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation * * *.

STATEMENT

1. Petitioner, a native of Hungary, came to the United States in 1921 at the age of 22 (R. 77). On November 28, 1940, he was admitted to United States citizenship by a decree of the United States District Court for the Eastern District of New York (R. 81).

On April 21, 1955, the government filed a complaint[3] (R. 15-23) in the United States District Court for the Southern District of California, pursuant to Section 340(a) of the Immigration and Nationality Act, *supra*, charging that petitioner procured his naturalization through the concealment of material facts and the making of willful misrepresentations, and asking that the order admitting him to citizenship be revoked and set aside. Specifically, the complaint alleged that petitioner, in the proceedings which led to his naturalization, intentionally concealed (1) that he then was,

[3] This was a second amended complaint. The original complaint (R. 1-6) was filed on October 1, 1953.

and since about 1926 had been, an active member and officer of the Communist Party of the United States, and (2) that he had been arrested for and charged with certain described offenses in New Haven, Connecticut, during the years 1929 and 1930[4] (R. 16-17). The complaint further alleged that petitioner falsely represented in the naturalization proceedings (1) that the only organization to which he belonged was the "Fraternal Benefit Society of International Workers Order," whereas in truth he then was, and since about 1926 had been, an active member and officer of the Communist Party, and (2) that he had never been arrested for or charged with the violation of any law of the United States or any state or of any city ordinance or traffic regulation, whereas in fact he had been arrested for and charged with the offenses referred to in the concealment portion of the complaint (R. 19-21).

Attached to the complaint was an affidavit by an attorney of the Immigration and Naturalization Service (R. 23-26) stating that it appeared from the records of the Service that in the naturalization proceedings petitioner had falsely stated under oath that he had never belonged to any Communist, Nazi or Fascist organization and that the only organization to which he belonged was the Fraternal Benefit Society of the International Workers Order, whereas in truth, it was said, petitioner was at the time of his naturalization, and since about 1926 had been, an active member and officer of the Communist Party (R. 24). The affidavit contained no allegation or representation pertinent to

[4] The nature of these offenses is referred to *infra*, pp. 9-10.

the charge of the complaint that petitioner had concealed and falsified his arrest record.

On November 7, 1955, petitioner filed an answer (2 Tr. 312-315), denying the principal allegations of the complaint and asserting that the Immigration and Naturalization Service had not "reasonably relied solely" on the facts supplied by him in the naturalization proceedings in failing to make a full and proper investigation of his qualifications for citizenship.

2. The evidence adduced at the denaturalization trial may be summarized as follows:

a. The concealments and misrepresentations charged: On November 8, 1939, petitioner filed with the Immigration and Naturalization Service his "Preliminary Form for Petition for Naturalization" (G. Exs. 2a and 2b,[5] R. 71). Question 30 on this form read (G. Ex. 2b, R. 71):

> 30. Have you ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation?.....
> If so, give full particulars.....
> .....

In the executed form as filed by petitioner, the question was answered "No" and the space for "particulars" was blank (*ibid.*)

On June 27, 1940, petitioner appeared under oath before Calvin Derrenger, a preliminary examiner for

[5] These exhibits consisted of the front and back sides, respectively, of this form. Government Exhibits 2f and 2g (discussed *infra*) were, similarly, the front and back sides of another pertinent document, the triplicate copy of petitioner's (final) petition for naturalization (R. 73).

the Service, whose purpose it was, in accordance with "standard practice and procedure", to go over each item on the preliminary form that the applicant for naturalization had either "filled out or failed to fill out" and "ask him specifically every question that was on [the] form and note his answers or make any corrections or changes that were needed in it" (R. 27-28, 31; 5 Tr. 39-40). It was his custom and practice, Derrenger testified, to go into the matter of arrests "very thoroughly to make sure that they [applicants] gave a complete answer." To indicate that the question pertaining to arrests had been orally asked, and that the answer which appeared on the form was the answer which the applicant had orally given, the practice was to "circle the answer that [appeared on the form], initial it and date it" (R. 31). On petitioner's form, the answer "No" to the question concerning arrests was circled, and above the circle, in Derrenger's handwriting, were his initials ("CD") and the date ("6-27-40") (R. 31-32; G. Ex. 2b, R. 71). This signified, Derrenger testified, that he "asked that question and that is the answer that was given to me" (R. 31-32).[6]

If an applicant answered "yes" to the question concerning arrests, Derrenger testified, the examiner would

[6] Derrenger had no independent recollection of petitioner or of the occasion when petitioner appeared before him (5 Tr. 16, 28-29). His testimony in this instance, as well as his other testimony, was based on the established procedure in conducting preliminary examinations, his own custom and practice, and notations, markings and remarks which he placed on petitioner's various application papers (see, *e.g.*, R. 28-32; G. Exs. 2a, 2b, R. 71; G. Exs. 2f, 2g, R. 73). The genuineness of these documents was stipulated by counsel (5 Tr. 11).

note on the form whatever information the applicant furnished, and the matter would in due course "go to the investigative unit" of the Service for "further investigation" (R. 32-33). This would include "check-[ing] with the authorities" at the places where the arrests occurred "to ascertain * * * whether the full facts were stated" (R. 33).

In addition to reviewing with petitioner his answers to the questions on the preliminary form of his petition, Derrenger, at the same interview and in accordance with his usual practice, typed onto the back of another document, the triplicate copy of petitioner's final petition for naturalization (G. Exs. 2f and 2g, R. 73), in a space headed "Result of Examination", various items of information orally supplied him by petitioner (while still under oath) in response to further questions (R. 28-31; 5 Tr. 10, 13-16). One of the notations appearing in this space on petitioner's form, typed and initialed by Derrenger, was the following (G. Ex. 2g, R. 73):

> Organization—Fraternal Benefit Society of Internation [*sic*] Workers Order, where applicant is employed—no others. ed

Derrenger knew from this, he testified, that he had asked petitioner to name all of the organizations to which he belonged, and that petitioner had replied that he belonged to the named organization "and to no other[s]" (R. 29-30; 5 Tr. 32-33).

Derrenger also asked petitioner during the interview "whether he believed in Nazism, Communism or Fascism," and petitioner responded in the negative

(R. 28-29). Based on this answer, and on his replies to other questions, Derrenger concluded that petitioner was attached to the principles of the Constitution—a statutory requirement for naturalization[7]—and recorded that conclusion on petitioner's form by the typed symbol "AC" (R. 28-29; 5 Tr. 17; G. Ex. 2g, R. 73). If petitioner's answer to the question had been in the affirmative, Derrenger said, he would have indicated on the form (by the symbol "NAC") that petitioner was not in his judgment attached to the principles of the Constitution (R. 28).

Also appearing on this form was the notation "NCR anywhere" (G. Ex. 2g, R. 73). This meant "no criminal record anywhere," Derrenger testified, and indicated that he "asked the petitioner if he had any record of arrests anywhere and his answer was that he had 'none'" (R. 29).

Following his examination by Derrenger, petitioner appeared under oath before Reuben E. Wilson, a "designated examiner" (an officer "specifically designated by the judge of the court to conduct the preliminary hearings on these petitions"), for the "initial hearing" on his citizenship application (5 Tr. 45, 50-52). This official, who "would conduct practically the same type of examination that was conducted by the preliminary examiner," had his own "method of noting the results of that hearing" (5 Tr. 51). It appears from the physical evidence (G. Ex. 2g, R. 73), as interpreted and explained by Derrenger (who was familiar with Wilson's system of notations, see 5 Tr. 52-64), that petitioner repeated before Wilson his statements that he had never been arrested and that the only or-

[7] 8 U.S.C. (1934 ed.) 382; now 8 U.S.C. 1427(a).

ganization to which he belonged was the Fraternal Benefit Society of the International Workers Order (5 Tr. 52-54, 58-60). Wilson, like Derrenger, came to the conclusion, as a result of his examination, that petitioner was attached to the principles of the Constitution. He indicated that conclusion on the petition form by the symbol "AC" (5 Tr. 60-63; G. Ex. 2g, R. 73), and recommended to the court that the petition be granted (5 Tr. 63-64).

b. Petitioner's arrest record: Contrary to his representations in the naturalization proceedings, petitioner had the following record of arrests:

On July 30, 1929, he was arrested and charged with distributing handbills in a public street, in violation of a New Haven, Connecticut, city ordinance (G. Ex. 1-A, R. 53-56; R. 69-70). He pleaded not guilty and was acquitted (R. 55).

On December 21, 1929, he was arrested and charged with making "an oration, harangue, or other public demonstration in New Haven Green, outside of the churches", in violation of the "Charter & Ordinances" of New Haven (G. Ex. 1-B, R. 58-61; R. 70). A demurrer to the charge was overruled (R. 60; G. Ex. 1-C, R. 63-64) and petitioner pleaded not guilty (R. 60). There is some confusion in the record as to the final disposition of the case by the court.[8]

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[8] The denaturalization complaint described the "[d]isposition" of this case as follows: "plea—not guilty., Found J.S." (R. 17, 20). The district court, in its findings of fact, used similar language (R. 82, 86). The original record of the charge and its disposition, however, reads (R. 60):

Plea,	Not Guilty	Found	Guilty
		J.S.	

The meaning of "J.S." is uncertain. It may possibly mean "Judgment Suspended."

On March 11, 1930, he was arrested and charged with "General Breach of the Peace" (G. Ex. 1-D, R. 65-65c). He was found guilty, sentenced to pay a fine of $25, and ordered to stand committed until the judgment was satisfied (R. 65c). These proceedings were in the New Haven City Court. It appears that an appeal was taken to the Criminal Court of Common Pleas of New Haven County (R. 65c; G. Ex. 1-E, R. 66-67); that in the April, 1930, Term of the latter court an information was filed charging petitioner with having on March 11, 1930, "disturb[ed] and br[oken] the peace by tumultuous and offensive carriage, noise and behavior, against the peace, of evil example, and contrary to the Statute in such case made and provided" (apparently a reference to the same offense with which he was charged in the New Haven City Court) (R. 67); and that on April 7, 1930, the charge was "Nolled" (R. 68).

c. Petitioner's Communist Party membership and activities: The following is uncontradicted evidence of petitioner's active membership in the Communist Party from a time antedating and spanning the dates of his application for and receipt of naturalization (June 27, 1940, and November 28, 1940, respectively):

In the winter of 1930-1931, petitioner introduced himself to a group of Young Communist League members in Buffalo, New York (among them, government witness Kenneth Kalke) as "Comrade Chaunt," the "new district organizer of the Communist Party" (R. 33-34; 5 Tr. 113-115).[9] Kalke thereafter received in-

[9] The area covered by the Buffalo District of the Communist Party (District No. 4), in 1931, included all of western and part of central and south central New York and a small portion of northwest Pennsylvania (R. 35-36).

structions from petitioner (5 Tr. 115). Three weeks following their introduction, petitioner told Kalke he was to do "agitational work" on behalf of the Party at a specified place (5 Tr. 116). In March 1931, at a district convention of the Young Communist League in Rochester, New York, petitioner, after being introduced to the convention as "Comrade Chaunt, the district organizer of District No. 4 [the Buffalo district] of the Communist Party" (R. 35), pointed out to the delegates the important part they played in recruiting young workers into the Young Communist League and eventually into the Communist Party, and told them that, as members of the Young Communist League, it was their duty to fight for the interests of the Soviet Union (R. 34). In April 1931, Kalke was present at a Buffalo district committee meeting of the Young Communist League and petitioner told him he was being sent to Syracuse, New York, as a "colonizer" for the League in that city (5 Tr. 124-127, 129-130). Later in 1931, petitioner ordered Kalke to go to Niagara Falls and communicate with League and Party members in connection with certain "protest meetings" (5 Tr. 131-132).

In the summer of 1931, petitioner taught a course in the basic principles of Leninism at a Communist Party training school in Hamilton, Ontario (R. 40-44). Government witness John Lautner, at that time a Party member, was the director of this school (R. 40-41). Petitioner was known to Lautner as the Party's district organizer for the Buffalo district (R. 40-41, 45). Though Lautner had not previously met petitioner, petitioner was already known to him as a Party leader

(R. 44). When Lautner first joined the Communist Party, in 1929, he knew petitioner to be the Party's district organizer in Connecticut (R. 44-45; 6 Tr. 287). Lautner, who from 1936 to 1940 was himself a district organizer of the Party (for the West Virginia district)[10] (6 Tr. 289), testified that the "district organizer" "was the representative of the Central Committee" of the Party in that particular district and took orders from that body (6 Tr. 338; 7 Tr. 397-398). "His voice and authority was the authority of the Central Committee" (6 Tr. 338). To be a district organizer, one had to "have a thorough understanding and knowledge of the principles of Marxism and Leninism, the ideology, the philosophy, and also the application of this ideology and philosophy in the day-to-day activities of the Communist Party" (6 Tr. 338-339).

In or about 1933, petitioner became the Party's district organizer for the area in and around St. Louis, Missouri (R. 39-40). On July 3, 1933, in Columbia, Missouri, government witness George Duemler was presiding at a convention of a group known as the Continental Congress of Workers and Farmers when petitioner marched down the center aisle of the convention hall at the head of a group of people demanding that "credentials [be] furnished to the Communist Party" (R. 36-37, 38-39). In February 1934, petitioner was the Communist Party representative at a protest meeting concerning Austria in the office of the

[10] Later, from 1947 to 1950, Lautner headed the Party's New York State Review Commission (a disciplinary body) and during the last three years of that period was a member of its National Review Commission (6 Tr. 290-291).

Austrian consul in St. Louis (6 Tr. 218-219). During this period (1933-1934), according to Duemler, petitioner was "the one person in complete authority so far as the Communist Party was concerned in that area" (R. 36, 40). So far as the public was concerned, "the Communist Party was Chaunt and Chaunt was the Communist Party" (6 Tr. 236).

In 1936 or 1938, Lautner met petitioner at the national convention of the Communist Party, petitioner being present as the head of the Missouri delegation (R. 44, 45; 7 Tr. 382-383). Lautner continued thereafter to meet petitioner from time to time at Party national conventions and National Committee meetings (R. 44). During the 1930's, according to Lautner, petitioner was well known in the "leading circles" of the Party, *i.e.*, the "[h]igh functionaries * * * and so-called old-timers" (7 Tr. 449-450).

From 1939 to 1942, petitioner was on the educational staff of a training school run by the International Workers Order (IWO), a "multinational organization" which was controlled and dominated by the Communist Party (7 Tr. 383-388). In the summer of 1940, Lautner discussed with petitioner the progress at this school of a student whom Lautner had sent to it from West Virginia, where he (Lautner) was the Party's district organizer (6 Tr. 289; 7 Tr. 383-386). In the spring of 1941, Lautner and other Party members "were sent into that organization [the International Workers Order] by the Communist Party * * * to give more political content and strength and guidance" to it (7 Tr. 387-388). Petitioner was the IWO "assistant school director" at the time (7 Tr. 388). Between

that time and November 1942, Lautner saw petitioner on numerous occasions, sometimes daily, as they worked "out of the same office" and for "the same organization" (7 Tr. 386).

The last time Lautner saw petitioner was in Cleveland, Ohio, in the winter of 1945-46 (R. 45-46). Lautner, who was then the national secretary of the Hungarian Bureau of the Communist Party, had gone to Cleveland to organize a local branch of this Bureau (R. 46; 6 Tr. 332). Petitioner, who attended the meeting as district representative of the Party's Ohio District (R. 46), emphasized to those present the necessity of eradicating all vestiges of "reversionism of the Browder type" from the minds of the Hungarian Party membership in Cleveland and of organizing a bureau that would give leadership to Hungarian Party members and sympathizers in the area (R. 46-47).

In addition to the foregoing testimony, numerous documents were introduced at the trial to establish petitioner's activity and official status in the Communist Party. These included Party membership books for 1928 (G. Ex. 4, 6 Tr. 193-194, 197, 327), 1930 (G. Ex. 5, 6 Tr. 194, 197, 326-327) and 1931 (G. Exs. 6 and 7, 6 Tr. 194-195, 197, 326-327) signed by petitioner as district organizer (6 Tr. 192-196), and articles from the Party organ, the *Daily Worker*, describing petitioner's Party activities and status (G. Exs. 8-13, 7 Tr. 406-416).

Petitioner, called as a witness by the government, declined to answer any question other than to state that he was the defendant in the action (8 Tr. 532-538). He did not testify in his own behalf.

3. At the conclusion of the trial, the district court

made findings of fact (R. 80-88) and conclusions of law (R. 88-89), and entered a judgment canceling petitioner's naturalization (R. 90). The court found that there was "clear, unequivocal and convincing evidence" establishing "beyond all reasonable doubt" that petitioner's naturalization had been procured through the deliberate concealment of material facts and the making of willful misrepresentations (R. 81, 84). Petitioner, the court found, had concealed (1) that prior to and at the time of filing his petition for naturalization (and at the time of his naturalization) he had been and was "an active member, officer and full-time paid functionary of the Communist Party of the United States", and (2) that he had been arrested and charged with the violations of law set forth in the denaturalization complaint (R. 81-82). These facts were material, the court held, because, as a consequence of their concealment, the Immigration and Naturalization Service recommended to the naturalization court that it grant petitioner's naturalization petition without making a full and proper investigation as to whether petitioner had all of the requisite qualifications for citizenship, including good character and attachment to the principles of the Constitution (R. 82-83). The misrepresentations which the court found petitioner to have made were, *inter alia*, that he belonged to no organization other than the "Fraternal Benefit Society of International Workers Order" and did not believe in Communism, Fascism or Nazism (whereas in fact he had been an active member and officer of the Communist Party since approximately 1926), and that he had never been arrested or charged with the violation of any federal or state law, city ordinance, or traffic regu-

lation (whereas in fact he had been arrested and charged with the offenses described in the complaint) (R. 84-86). These and other misrepresentations found to have been made, the trial court held, had (like the concealments) resulted in petitioner's being admitted to citizenship without a proper investigation of his qualifications therefor (R. 87-88).

The court of appeals, finding that petitioner's concealment of, and misrepresentations with respect to, his arrest record amply supported the judgment of the district court, unanimously affirmed, without passing upon the other findings of the district court (R. 91-98).

SUMMARY OF ARGUMENT

I

The court of appeals correctly affirmed the judgment of denaturalization on the basis of petitioner's concealment and false denial of his arrest record.

A. The fact that the affidavit of good cause did not refer to this ground of denaturalization did not bar its inclusion in the complaint, which afforded petitioner full notice.

1. Preliminarily, we point out that the argument that the complaint cannot go beyond the affidavit was abandoned by petitioner in the court of appeals, and he points to no reason why he should be permitted to renew it in this Court. Nor is the issue one which the Court should consider *sua sponte*.

2. The contention is unsound in any event. The purpose of the requirement of a good-cause affidavit is to protect the defendant from ill-considered action which

might damage his reputation and standing in the community. Where, as here, an affidavit which fulfils this purpose is in fact filed, to hold that a ground not set forth in the affidavit cannot be alleged in the complaint or relied upon by the court in decreeing denaturalization would unjustifiably emphasize the significance of the affidavit and in effect make it perform the function of the complaint. As long as a defendant is secured against the possibility of governmental irresponsibility by the requirement that at least one good ground of denaturalization be set forth in the affidavit, the statutory mandate is satisfied.

B. Petitioner's arrest record was a material fact within the meaning of the denaturalization statute.

1. The test of materiality under the statute is not whether truthful answers would in themselves have justified denial of citizenship, nor whether disclosure of the true facts would assuredly have led to discovery of other facts which would have justified denial of citizenship. The test is whether the falsification had the effect of precluding the government from pursuing an avenue of investigation which might have resulted in the applicant's failure to obtain citizenship.

2. The same standard has been applied in determining the materiality of false statements made in visa applications and other documents used by aliens to procure admission into the country, *viz.*, the tendency of the misrepresentation to forestall inquiry as to the applicant's eligibility to enter. Thus, it has been pointed out that a rule which would permit an alien to make a false statement in his application for a visa in order

to avoid the raising of a substantial question as to his eligibility to enter the country and then, if he is caught in the false statement after having successfully choked off investigation, to try out his eligibility just as if he had made no false statement, would be an invitation to false swearing. The same would be true in respect to false statements in naturalization petitions.

Again, it has been pointed out that a rule under which a false representation in a visa application would be deemed material only when inquiry resulting from the true facts would clearly have resulted in the refusal of the visa "would force the courts into the realm of conjecture and speculation, in trying to make a decision only the proper authorities could have capably made." *Landon* v. *Clarke,* 239 F. 2d 631, 635-636 (C.A. 1). Similarly, under such a rule as applied to naturalization applications, the court of denaturalization would be required to speculate as to what disposition the court of naturalization would have made of the application for citizenship on the basis of facts which might have been uncovered by an investigation which was in fact never made because of the applicant's false statement.

3. Our view as to the meaning of materiality under the denaturalization statute is also supported by the materiality test applicable in perjury cases, *viz.*, whether the false testimony has a natural effect or tendency to influence or impede the investigating body in pursuing its investigation. Under this test, one who has given false testimony will not be heard to say that his testimony was not material merely because the jury or other body before which it was given would probably

have reached the same verdict or result had the falsehood not been told.

4. The question asked petitioner concerning his prior arrests was pertinent to the issue of his moral character. The courts have repeatedly held that false answers to questions concerning an alien's criminal record, by shutting off further inquiry into the alien's moral character, constitute a fraud upon the naturalization court and are valid grounds for denaturalization. Even though (as here) the misrepresentation concerns arrests occurring before the five-year statutory period during which good character must be shown, their concealment is none the less material since they relate to the person's moral character in general and the concealment prevents inquiry directed specifically to his moral character during the statutory period.

5. Petitioner's assertion that two of the ordinances under which he was arrested were unconstitutional is irrelevant. A naturalization applicant who is asked if he has ever been arrested is required to disclose his arrests, whether the statutes or ordinances under which he was charged were valid or invalid. In any event, the argument based on the alleged unconstitutionality of two of the ordinances in question does not reach the third arrest, for "general breach of peace"; the legality of that arrest is not questioned.

6. Even if nothing adversely reflecting on petitioner's private moral character had been discovered as a result of the investigation which would have been made had he not concealed his arrest record, it does not fol-

low that his petition for naturalization would have been unaffected. His membership and leadership in the Communist Party might well have been discovered, and, if it had been, it is clear from the evidence that the Immigration and Naturalization Service would have recommended against the granting of his petition on the ground that he was lacking in attachment to the principles of the Constitution.

II

The judgment of denaturalization is independently sustained by petitioner's fraudulent concealment of his Communist Party membership.

This ground, adopted by the district court, was not reached by the court of appeals, and need not be reached by this Court if the Court agrees with the government on Point I. If, however, the Court disagrees with the government on Point I, petitioner's concealment of his Party membership presents an alternative basis for sustaining the judgment below.

Although we recognize that this Court commonly remands to the court of appeals for consideration of issues pretermitted by that court, the practice is far from an unvarying one, and there are persuasive reasons for believing that this Court should finally dispose of this case now.

The evidence that petitioner was a member of the Communist Party and an active and vigorous exponent of Communism is overwhelming and uncontradicted. Indeed, petitioner's argument to the court of appeals on this phase of the case was strictly a legal one, *i.e.*, that this issue is controlled by this Court's decisions in

Nowak v. *United States*, 356 U.S. 660, and *Maisenberg* v. *United States*, 356 U.S. 670. He has made no effort to challenge the evidentiary basis of the district court's findings as distinguished from their legal significance. In these circumstances, the question here narrows to the legal issue whether this case is controlled by *Nowak* and *Maisenberg*, or whether it is significantly different from those cases. This issue may appropriately be determined by this Court at the present juncture.

This case, in our view, cannot be deemed to fall within *Nowak* or *Maisenberg*. In each of those cases, the charge of fraud stemmed from the defendant's allegedly false answer to the second part of question 28 on the naturalization form ("Are you a believer in anarchy? . . . Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? . . ."). The defendant's negative answer to the second part of this question, the Court held, was not shown to be false merely on the basis of proof that he was a member of the Communist Party and that the Party advocated the overthrow of existing government, because the Court concluded that the second part of the question could well be interpreted as requiring disclosure only of membership in anarchistic organizations. The instant case does *not* turn on the clarity of question 28, for petitioner was *also* asked, in his naturalization proceedings, to name all of the organizations to which he belonged and to state whether he believed in Communism. The inescapable import of his responses stating that the only organization to which he belonged was a fraternal benefit society which

he named and that he did not believe in Communism was that he was not a Communist or a Communist Party member. The facts are to the contrary.

The responses were not only false; they were material. For, if petitioner had revealed his Communist Party membership, a path of significant further inquiry would have been opened up. The meaningfulness of his membership and the degree of his commitment to Party tenets and ideology could then have been explored. If such further inquiry uncovered (as it doubtless would have) the fact that petitioner was, and had been for years, not only an active and zealous Party member, officer, and full-time functionary, but one of the leaders of the Party, his suit for citizenship, in which he bore the burden of proving his attachment to the principles of the Constitution, obviously might have failed. His concealment of his Party membership, precisely because it forestalled such inquiry, constituted the concealment of a material fact.

ARGUMENT

The district court based its judgment of denaturalization on petitioner's concealment and false denial of (1) his arrest record and (2) his Communist Party membership. The court of appeals found it unnecessary to consider the second of these grounds because it concluded that the first ground amply supported the judgment. Petitioner challenges the sufficiency of the ground which the court of appeals considered (Br. 8-19); as to the other ground, petitioner suggests that, should he prevail here in the limited challenge he makes, the cause be remanded to the court of appeals for further consideration (Br. 5, fn. 2).

We shall argue, *first*, that the court of appeals correctly affirmed the district court's judgment on the ground which it considered, and, *second*, that in all events the judgment should be sustained on the basis of the unequivocal and uncontradicted evidence demonstrating petitioner's concealment of his Party membership.

I

The Court of Appeals Correctly Affirmed the Judgment of Denaturalization on the Basis of Petitioner's Concealment and False Denial of His Arrest Record

Petitioner's challenge to the denaturalization judgment, in so far as that judgment rests on the finding that he concealed and falsified his arrest record, is twofold. He contends (1) that this was not a valid basis of judgment because it was not set forth in the affidavit of good cause filed with the denaturalization complaint (Br. 8-10), and (2) that the fact concealed and falsified, *i.e.*, the record of his arrests, was not a "material" fact within the meaning of Section 340 (a) of the Immigration and Nationality Act (*supra*, pp. 2-3) (Br. 11-19). Neither argument, we submit, is sound.

A. *The fact that the affidavit of good cause did not refer to petitioner's concealment and false denial of his arrest record was not a bar to his denaturalization on that ground*

1. Preliminarily, we point out that the claim that the affidavit of good cause was deficient, although raised in the district court,[11] was not pursued in the

[11] Even in the district court, it is doubtful if petitioner adequately preserved the point. In that court, following the filing of the original

court of appeals. It was not mentioned before that court, either by brief or orally,[12] and the court's opinion is, of course, silent on the subject. It should accordingly be deemed to have been waived or abandoned. Cf. *Barr* v. *Matteo*, 244 F. 2d 767, 769 (C.A. D.C.), reversed on other grounds, 355 U.S. 171; see also *Hegeman Farms Corporation* v. *Baldwin*, 293 U.S. 163, 168; *Eastman Company* v. *Southern Photo Company*, 273 U.S. 359, 369; *Home Benefit Association* v. *Sargent*, 142 U.S. 691, 694-695; *Whiting* v. *Bank of the United*-

complaint (R. 1-6 (see fn. 3, *supra*, p. 3), petitioner filed a motion to dismiss (R. 10-12) setting forth numerous grounds for such requested action. One of the grounds relied on was that "one of the causes of action sought to be alleged in the complaint is not supported by an affidavit of good cause as required by section 340(a) of the said Act" (R. 11-12)—in other words, the point now urged. The motion was denied (R. 13-14). Thereafter, an amended complaint (1 Tr. 105-115) and, later, a second amended complaint (R. 15-23)—the latter being the one on which trial was held—were filed. In each instance petitioner renewed his motion to dismiss (1 Tr. 154-156; 2 Tr. 268-270), urging on each occasion the same grounds on which he relied in his original motion to dismiss, *except* that the point now urged was not repeated. In these circumstances, we think that petitioner must be taken to have abandoned the point in the district court. His argument that he "was under no obligation, and it would have been fruitless, to raise again before the trial court the same objection which the trial court had already overruled" (Reply to our brief in opposition to certiorari, p. 2) overlooks the fact that he did renew his other previously rejected grounds in his motions to dismiss the amended and second amended complaints.

[12] One of the "points" which petitioner, in his "Statement of Points on Appeal" (filed with his designation of the record on appeal) said he intended to raise on appeal was (No. 8) "[t]hat the affidavit of cause filed herein is not a sufficient affidavit to meet the requirements of the governing statute, Sec. 340 of the Immigration & Nationality Act of 1952." There was no allegation, however, as to the respects in which the affidavit was deemed insufficient, and even the general allegation was omitted from the "Statement of Points" in the brief. Cf. *Barr* v. *Matteo*, 244 F. 2d 767, 769 (C.A. D.C.), reversed on other grounds, 355 U.S. 171.

States, 13 Pet. 6, 14; and see Rule 18(2)(d) of the Rules of the Court of Appeals for the Ninth Circuit.[13]

To be sure, this Court has the power to notice errors which were not called to the attention of the court of appeals; but this power, like the power to notice errors not brought to the attention of the trial court, should be exercised only "[i]n exceptional circumstances," where the errors are "obvious" or "otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson,* 297 U.S. 157, 160, and cases cited; cf. *Barr* v. *Matteo, supra.* We argue below (*infra,* pp. 25-27) that the district court did not err. But even if we are wrong, the error, we submit, was neither obvious nor such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings." Petitioner's abandonment of the point in the court of appeals should therefore preclude him from raising it now.

2. Petitioner's contention is unsound on its merits. The basic purpose underlying the requirement of a good-cause affidavit is "to protect those proceeded against from ill-considered action" (*Nowak* v. *United States,* 356 U.S. 660, 662) which might cause damage to their reputation and standing in the community. *United States* v. *Zucca,* 351 U.S. 91, 99-100. The defendant, in other words, is entitled to the assurance that the government is not initiating such a proceeding in reckless disregard of his rights or reputation,

[13] This rule requires, *inter alia,* that the brief for the appellant in all cases contain "a specification of errors relied upon which * * * shall set out separately and particularly each error intended to be urged." Cf. *Barr* v. *Matteo, supra,* 244 F. 2d at 769.

but is proceeding only after a careful evaluation of facts which it is willing to put to the test of judicial scrutiny. *Ibid.* It is apparent from its face—and petitioner makes no contrary claim here—that the affidavit in this case (R. 23-26) satisfies this statutory purpose. It describes petitioner's Communist Party membership and the concealment and misrepresentation of such membership in adequate detail. In short, as the affidavit stands, it sets forth "evidentiary matters showing good cause for cancellation of citizenship" (*United States* v. *Zucca, supra,* 351 U.S. at 99.)

Petitioner's argument is that the affidavit limits the scope of the complaint and that a ground not set forth in the affidavit cannot be alleged in the complaint or relied upon by the court in decreeing cancellation of citizenship (Br. 10). We see no basis for such a stringent requirement.

First, petitioner's view equates the evidence that must be set forth in the affidavit with that which is required to support the ultimate judgment of denaturalization. Just as the standard for determining whether enough evidence exists to warrant arrest or search under the Fourth Amendment ("probable cause") is different from the standard of proof required for conviction (see *Brinegar* v. *United States,* 338 U.S. 160, 175-176), so too the evidence required to be set forth in the affidavit is not the same as that required to support the denaturalization decree. To designate the affidavit as the depository of each and every charge which must be proved would be to render the complaint all but meaningless. Cf. *Schneiderman* v. *United*

States, 320 U.S. 118, 159-160, where this Court refused to consider as part of the charge an allegation made in the affidavit of good cause which was not included in the complaint.

Secondly, the defendant would gain no meaningful protection by a rule requiring that all the grounds asserted in the complaint be included in the affidavit and barring any different reason from being used as an additional charge in the complaint. The affidavit gives him protection against irresponsible action in instituting a denaturalization suit; the complaint gives him notice of what he must defend against. He is thus fairly protected. "From such an affidavit [of good cause] an experienced judge should be able to detect a United States attorney's reckless categorization or noncritical selection of candidates for denaturalization, and we think that is all Congress intended by the procedural safeguard." *United States* v. *Minerich*, 250 F. 2d 721, 725 (C.A. 7). We submit that, as long as a defendant is secured against governmental irresponsibility by the requirement that at least one ground evincing good cause be stated in the affidavit, the statutory mandate is satisfied.

B. *Petitioner's arrest record was a material fact because his concealment of it blocked an avenue of inquiry which might have resulted in his failure to obtain naturalization*

Petitioner further contends (Br. 11-19) that his concealment and false denial of his arrest record were not material within the meaning of the denaturalization statute (*supra*, pp. 2-3) because there was no show-

ing that he would have been denied naturalization if he had disclosed his arrests.

1. The test of materiality under the statute is not, however, as petitioner contends, whether truthful answers "would in themselves have justified denial of citizenship" (Br. 11), or whether "[d]isclosure of the true facts would have led to discovery of other facts which would have justified denial of citizenship" (*ibid.*). The proper standard is whether the falsification had the effect of precluding the government from pursuing an avenue of investigation which might have resulted in the applicant's failure to obtain citizenship. *United States* v. *Montalbano*, 236 F. 2d 757, 759-760 (C.A. 3), certiorari denied *sub nom. Genovese* v. *United States*, 352 U.S. 952; *Corrado* v. *United States*, 227 F. 2d 780, 782-784 (C.A. 6), certiorari denied, 351 U.S. 925; *United States* v. *Galato*, 171 F. Supp. 169, 173-174 (M.D. Pa.); *United States* v. *Profaci*, 168 F. Supp. 631, 636 (E.D. N.Y.), reversed on other grounds, 274 F. 2d 289 (C.A. 2); *United States* v. *Chandler*, 152 F. Supp. 169, 172-173, 177-178 (D. Md.); *United States* v. *Lumantes*, 139 F. Supp. 574, 575 (N.D. Cal.), affirmed, 232 F. 2d 216 (C.A. 9); *United States* v. *Genovese*, 133 F. Supp. 820, 827-829 (D.N.J.), affirmed *sub nom. United States* v. *Montalbano, supra*, 236 F. 2d 757; cf. *United States* v. *Accardo*, 113 F. Supp. 783, 785 (D.N.J.), affirmed, 208 F. 2d 632 (C.A. 3), certiorari denied, 347 U.S. 952.

In *United States* v. *Montalbano, supra*, 236 F. 2d 757, one of the appellants argued, in the same vein as petitioner, that his citizenship "cannot be revoked on account of fraud because, even had he revealed his crim-

inal record during [the] naturalization proceedings, that record was such that it would not have justified a refusal of citizenship" (at 759). "The theory seems to be," said the Third Circuit in rejecting this argument, "that one may deliberately engage in a falsehood concerning required facts during naturalization proceedings without fear of consequences so long as the truth, had it been revealed, would not have resulted in refusal of citizenship. The proposition has a built-in rebuttal. Mere recital of it bares its absurdity. If the government thinks it important enough to ask a question which it has authority to ask, the answer cannot be considered immaterial and meaningless. That the answer may not lead to a refusal of citizenship is not the only consideration. The government is entitled to know all the facts which it requires" (*ibid.*).

The same issue—whether the defendant's concealment of his arrest record could be the basis of a decree of denaturalization—was presented in *Corrado* v. *United States, supra,* 227 F. 2d 780, and the same result was reached. "Upon analysis," the Sixth Circuit said (at 784)—

> the issue is not whether naturalization would have been denied appellant had he revealed his numerous arrests, but whether, by his false answers, the Government was denied the opportunity of investigating the moral character of appellant and the facts relating to his eligibility for citizenship.

"How could any Government official or witness say whether or not citizenship would have been denied appellant from an investigation of the various causes of

his arrest," the court added, "when no opportunity for investigation was afforded? His false statement upon the material matter in actuality caused no investigation to be made" (*ibid.*). Pointing out that the award of citizenship "exacts the highest standard of rectitude," and that the government "should be afforded full opportunity for investigation of the moral character and fitness of an alien who seeks to be vested with [the privileges of citizenship]", the court concluded (*ibid.*):

> Where fraud has been practiced by the alien in procuring citizenship, it * * * will suffice to show that the applicant lied concerning a material fact which, if revealed, might have prevented his acquisition of citizenship.

In short, as observed in *United States* v. *Chandler*, *supra*, 152 F. Supp. at 177:

> * * * the test of materiality is not whether naturalization would have been refused if defendant had revealed the truth, but whether, by his false answers, the government was denied the opportunity of investigating the facts relating to his eligibility.[14]

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[14] Compare *United States* v. *Genovese*, *supra*, 133 F. Supp. at 828: "Although the arrests and convictions in themselves might not have provided sufficient basis for a denial of citizenship, certainly their disclosure would, or at least could, have motivated a more extensive investigation of defendant's past, especially within the five-year period prior to his petition, which investigation might have uncovered facts sufficient to require a refusal of naturalization. To that extent they were material and their nondisclosure under the circumstances attendant was fraudulent, and therefore constitutes a valid basis for revocation of citizenship."

2. The same standard has been applied in determining the materiality of false statements made in visa applications and other documents used by aliens to procure admission into the country, *viz.*, the tendency of the misrepresentation to forestall inquiry as to the applicant's eligibility to enter. *Duran-Garcia* v. *Neelly*, 246 F. 2d 287, 291 (C.A. 5); *Ablett* v. *Brownell*, 240 F. 2d 625, 630 (C.A. D.C.); *Landon* v. *Clarke*, 239 F. 2d 631, 634-636 (C.A. 1); *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 411-412 (C.A. 2); *United States ex rel. Volpe* v. *Smith*, 62 F. 2d 808, 812 (C.A. 7), affirmed on other grounds, 289 U.S. 422; *Ganduxe y Marino* v. *Murff*, 183 F. Supp. 565, 567 (S.D. N.Y.), affirmed *sub nom. Ganduxe y Marino* v. *Esperdy*, 278 F. 2d 330 (C.A. 2), pending on petition for certiorari, No. 224, this Term; cf. *Viruette Torres* v. *Hoy*, 269 F. 2d 289, 291 (C.A. 9); *United States ex rel. Jankowski* v. *Shaughnessy*, 186 F. 2d 580, 582 (C.A. 2). "The false statement of the name of appellant's mother", said the court in *Duran-Garcia* v. *Neelly, supra*, 246 F. 2d at 291, "was admittedly calculated to and could frustrate an inquiry into appellant's past * * *. Though perhaps a complete inquiry would have resulted in a discovery of no other material facts than the previous involuntary departure, it has been held that any concealment of information that tends to frustrate the proper official investigations is grounds for excludability under the statute, particularly if the deception is directed primarily against the United States." Similarly, in *United States* v. *Flores-Rodriguez, supra*, 237 F. 2d at 412, the court concluded that the defendant's false

denial in his visa application that he had ever been arrested for or convicted of any offense—

> * * * was material because it choked off a line of investigation which well might have resulted in his valid exclusion from the United States * * *.

A most persuasive reason for this rule was stated by District Judge Dimock in *Ganduxe y Marino* v. *Murff*, *supra*, 183 F. Supp. at 567 (affirmed by the Second Circuit "on the opinion of Judge Dimock" in *Ganduxe y Marino* v. *Esperdy*, *supra*, 278 F. 2d 330):

> A decision that an alien may make a false statement in his application for a visa in order to avoid the raising of a substantial question as to his eligibility and then, if he is caught in the false statement after having successfully choked off investigation, may try out his eligibility just as if nothing had happened would, it seems to me, be an invitation to false swearing.

Petitioner, having made a false statement in his application for naturalization in order to avoid the raising of a question as to his eligibility for citizenship, and having been caught in his falsehood after having successfully choked off investigation, contends in substance that in the proceedings to cancel the fraudulently procured decree he should be permitted to "try out his eligibility [for citizenship] just as if nothing had happened."

Another, and equally important, reason for the rule was pointed out in *Landon* v. *Clarke*, *supra*, 239 F. 2d 631. In that case the lower court had held that a mis-

representation in a visa application would be deemed material "only when inquiry resulting from the true facts would have been enough to justify the refusal of [the] visa" (239 F. 2d at 633).[15] The First Circuit, in reversing, stated (*id.* at 635-636):

> The district court's view, necessitating, as it does, proof of whether an alien would have been excludable if he had told the truth, or if the proper investigation had been held, in order to decide the

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[15] For other opinions dealing with visa applications which have stated, or tended to apply, this general test, see *Calvillo* v. *Robinson*, 271 F. 2d 249, 253 (C.A. 7); *United States ex rel. Fink* v. *Reimer*, 96 F. 2d 217, 218 (C.A. 2), certiorari denied, 305 U.S. 618; *United States ex rel. Leibowitz* v. *Schlotfeldt*, 94 F. 2d 263 (C.A. 7); *United States ex rel. Iorio* v. *Day*, 34 F. 2d 920, 921 (C.A. 2); *In re Field's Petition*, 159 F. Supp. 144 (S.D. N.Y.); *In re Iwanenko's Petition*, 145 F. Supp. 838, 842-843 (N.D. Ill.); *United States ex rel. Teper* v. *Miller*, 87 F. Supp. 285, 286 (S.D. N.Y.) We believe that the general approach enunciated in such opinions, for the reasons we discuss in the text, is misconceived, and that the opinions do not adequately analyze the issues involved. In some of the decisions, moreover, it appeared that the misrepresentations in question had not been made for the purpose of deceiving the immigration authorities, and the courts indicated, or at least implied, that, had that been its purpose, the opposite result might well have been reached. *United States ex rel. Leibowitz* v. *Schlotfeldt*, *supra* (applicant gave brother's name instead of his own, not out of any motive to deceive the immigration authorities, but because he had been living for years under his brother's name in his native country for reasons unrelated to his application to enter this country); *In re Iwanenko's Petition*, *supra* (applicant falsely gave place of birth as Poland, but solely to avoid being repatriated to the U.S.S.R., her true birthplace); and cf. the quotation, *supra*, p. 31, from *Duran-Garcia* v. *Neelly*, 246 F. 2d at 291. In the case at bar, petitioner's misrepresentation of his arrest record was manifestly for the purpose of deceiving the Immigration and Naturalization Service and the naturalization court. Furthermore, in certain of the decisions referred to in this footnote, *e.g.*, *Calvillo*, *Leibowitz*, it affirmatively appeared that an investigation would have revealed nothing derogatory and that the applicant would in the end have been granted the privilege he sought. That, of course, is not the situation here.

> materiality of a misrepresentation, would force the courts into the realm of conjecture and speculation, in trying to make a decision only the proper authorities could have capably made.

The rule for which petitioner argues would similarly require the court in which the denaturalization suit is brought to speculate. The court would have to attempt to decide whether the Immigration and Naturalization Service, on the basis of such facts as it might have discovered had it conducted the inquiry which it was prevented from conducting by the applicant's false statement, would have recommended to the naturalization court that it grant or deny the petition for citizenship, and what disposition of the petition the latter court would have made on the basis of the Service's recommendation. We submit that the proper interpretation of "material", as used in Section 340(a) of the Immigration and Nationality Act, ought not to require the court of denaturalization to enter into this "realm of conjecture and speculation."

3. Our view as to materiality under Section 340(a) is also supported by the test commonly applied in perjury cases. "The test of materiality of false testimony is whether the testimony has a natural effect or tendency to influence, impede or dissuade the investigating body from pursuing its investigation." *United States* v. *Moran*, 194 F. 2d 623, 626 (C.A. 2). See, also, *Woolley* v. *United States*, 97 F. 2d 258, 262 (C.A. 9), certiorari denied, 305 U.S. 614; *Carroll* v. *United States*, 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763; *United States* v. *Parker*, 244 F. 2d 943, 950-951 (C.A. 7), certiorari denied, 355 U.S. 836; *United States* v.

Goldstein, 168 F. 2d 666, 671 (C.A. 2); *Blackmon* v. *United States*, 108 F. 2d 572, 573 (C.A. 5); *United States* v. *Henderson*, 185 F. 2d 189, 191 (C.A. 7). The same rule governs application of the false statements statute (18 U.S.C. 1001): "The test is whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." *Weinstock* v. *United States*, 231 F. 2d 699, 701-702 (C.A. D.C.); see, also, *Freidus* v. *United States*, 223 F. 2d 598, 601-602 (C.A. D.C.). Under this test, one who has given false testimony, or made a false statement, before a grand or petit jury, congressional committee, or administrative agency will not be heard to say that his testimony or statement was not material merely because the inquiring authority might have reached the same result had the truth been told. If the false statement has a "natural effect or tendency" to impede the investigating body in its search for the truth, it is material, albeit the court in which the perjury or false representation charge is tried might believe or conclude, on the basis of its reconstruction of events, that the jury, committee, or other inquiring body would probably have arrived at the same verdict or result even if the true facts had been disclosed. No different test of materiality should apply to a false statement made in a naturalization petition.

4. Petitioner, in order to be naturalized, was required to establish that he had behaved as a person of good moral character during the five years preceding his naturalization.[16] The question asked petitioner

[16] 8 U.S.C. (1934 ed.) 382; now 8 U.S.C. 1427(a).

concerning his prior arrests was obviously pertinent to the investigation of his moral character. The naturalization court was entitled to weigh all the evidence necessary to determine whether petitioner met the good-character requirement—including any evidence which might have been discovered if, as the district court found here (*supra*, pp. 15-16), the government had not been prevented from making an investigation based on the concealed facts. Thus, the courts have repeatedly held that false answers to questions concerning an alien's criminal record, by shutting off further inquiry into the alien's moral character, constitute a fraud upon the naturalization court. *Stacher* v. *United States*, 258 F. 2d 112, 123 (C.A. 9), certiorari denied, 358 U.S. 907; *United States* v. *De Lucia*, 256 F. 2d 487, 490 (C.A. 7), certiorari denied, 358 U.S. 836; *United States* v. *Montalbano*, *supra*, 236 F. 2d at 759-760; *Corrado* v. *United States*, *supra*, 227 F. 2d at 782-784; *United States* v. *Galato*, *supra*, 171 F. Supp. at 173-174; *United States* v. *Profaci*, *supra*, 168 F. Supp. at 636; *United States* v. *Chandler*, *supra*, 152 F. Supp. at 172-173, 177-178; *United States* v. *Accardo*, *supra*, 113 F. Supp. at 785; cf. *Del Guercio* v. *Pupko*, 160 F. 2d 799, 800 (C.A. 9). Even though (as here) the misrepresentation concerns arrests occurring before the statutory period, their concealment is none the less material since they relate to the person's moral character in general and their concealment prevents inquiry directed specifically to his moral character during the statutory period. Cf. *Stevens* v. *United States*, 190 F. 2d 880, 881 (C.A. 7); *Corrado* v. *United States*, *supra*, 227 F. 2d at 781, 784; *United States* v. *De Lucia*,

supra, 256 F. 2d at 490; *United States* v. *Profaci*, *supra*, 168 F. Supp. at 636; *United States* v. *Chandler*, *supra*, 152 F. Supp. at 174, 178. In other words, it is not for the alien to decide, in answering clear and explicit questions asking for particular information, which facts concerning his moral character need not be disclosed (and can without fear of penalty be falsely denied) because he believes that they are not important enough for the government to investigate.

5. Petitioner argues, however, that his concealment of two of his arrests was immaterial because they were "for violations of city ordinances or regulations which clearly were unconstitutional on their face" (for which proposition he cites subsequent decisions of this Court) and that the concealment of his third arrest (for "general breach of peace") was likewise unimportant because it resulted in only a $25 fine, which "was nullified when the case was 'nolled' on appeal" (Br. 16-17). We submit that a naturalization applicant who is asked if he has ever been arrested is required to disclose *all* of his arrests, irrespective of the validity of the statutes or ordinances under which he was arrested. Even if the ordinance was unconstitutional, it does not necessarily follow that the arrest has no relevance to the question of his moral character. If the naturalization court wrongly denies him naturalization on the basis of such an arrest, or inferences as to his moral character erroneously based thereon, a ready remedy—an appeal to the higher courts—is available to him. Moreover, the argument based on the alleged unconstitutionality of two of the ordinances in question does not, as petitioner recognizes, reach the third arrest, for

"general breach of peace".[17] As the court of appeals stated (R. 97), "[t]he failure to disclose it [the latter arrest] alone would be sufficient to sustain the judgment of the district court. For it is not the number of arrests, nor the character of the offenses, which is the important factor. It is the concealment of any material fact sought to be inquired into, including any arrest, which is the fraudulent act and which justifies * * * the finding of fraud * * *".

Petitioner relies (Pet. 9, 10, 11; Br. 12) on *United States* v. *Anastasio*, 226 F. 2d 912 (C.A. 3), certiorari denied, 351 U.S. 931, and *United States* v. *Kessler*, 213 F. 2d 53 (C.A. 3), to support his contention that "denaturalization may not be based on misrepresentations of arrests the disclosure of which would not have warranted denial of naturalization" (Pet. 11). But in *Anastasio*, unlike the instant case, the government knew of the defendant's arrest record prior to naturalization, and therefore was not deceived; there was, in short, no question in that case of the government's being prevented by the applicant's misrepresentation from conducting an inquiry into the pertinent facts. 226 F. 2d at 917-918. In *Kessler*, the "arrests" involved were in fact "false arrests," for a crime ("Obstructing highway") "unknown to the law of Pennsylvania" (213 F. 2d at 56). The defendant in that case testified at her denaturalization trial that she gave a negative answer to the question about arrests in the naturalization proceedings because it was her understanding at the time of the "arrests" and her discharge from

[17] Of course, the fact that his prosecution on this charge was "nolled" on appeal does not establish that the *arrest* was illegal.

custody that she "didn't commit any crime or * * * do anything wrong", and she "didn't mean to lie" (213 F. 2d at 55). For these reasons, the court held that the defendant's answers not only were not willful misstatements but that they were not misstatements at all, since the question asked did not cover false arrests. The instant case is thus unlike *Kessler* in two vital respects. First, petitioner did not take the stand to testify why he did not disclose his arrests, nor is there anything in the record on which to challenge the findings below that the misrepresentation was knowing and willful. Second, there is no suggestion here that any of petitioner's arrests were "false arrests" in the sense of *Kessler* (*i.e.*, arrests for a crime totally unknown to the law), and petitioner does not suggest any illegality, even now, as to one of his three arrests.[18]

6. Finally, it does not follow that, if nothing adversely reflecting on petitioner's private moral character had been discovered as a result of the investigation which would have been made had he not concealed his arrest record, his petition for naturalization would necessarily have been granted. On the contrary, it would appear likely that, had such an investigation

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[18] See also *United States* v. *Montalbano*, *supra*, 236 F. 2d at 760 (including footnote 3), a later case also decided by the Third Circuit, which specifically considered the very portion of *Kessler* quoted by petitioner (Br. 12). The court in *Montalbano* said that the decision in *Kessler* was based on the fact that the defendant had not made an untruthful answer to the question inquiring about arrests (petitioner's answer was undisputedly untruthful), and held that the concealment of legal arrests constitutes a material misrepresentation since it prevents the government from making further inquiry. Since at least one of the arrests here was undisputedly legal, the decision of the court below is completely consistent with the position of the Third Circuit.

been made, petitioner would have failed to obtain naturalization for reasons apart from private moral character, *viz.*, lack of attachment to the principles of the Constitution. Petitioner, at the time of his arrests (in the years 1929 and 1930), was the district organizer of the Communist Party for the Connecticut district (*supra*, pp. 12, 14). As such, he held the topmost position in the Party hierarchy for that area—a position which required that he have "a thorough understanding and knowledge" of the ideology of Communism and how to apply it in the "day-to-day activities of the" Party (*supra*, p. 12). Although the record sheds no clear light on the matter, it seems not unlikely that the activities for which he was arrested—distributing handbills, making a harangue in an unauthorized place and disturbing the peace (see *supra*, pp. 9-10)—were related to his role as a Party leader and organizer. At the least it was possible, if not indeed highly probable, that, had the naturalization authorities made an investigation into the circumstances of petitioner's arrests, they would have discovered the fact of his position of leadership in the hierarchy of the Communist Party. And it is clear from naturalization examiner Derrenger's testimony that, had the authorities learned of that fact, they would have recommended against the granting of his petition for naturalization (*supra*, pp. 7-9). See, also, *infra*, pp. 45-47. Thus, wholly apart from private moral character considerations, it can be seen that there was a direct causal relationship between petitioner's concealment of his arrest record and his successful application for citizenship. Cf. *United States* v. *Chandler*, *supra*, 152 F. Supp. at 178:

Although defendant's arrests in 1930-1932 were not of themselves sufficient to show bad moral character in 1943 [citing *Schware* v. *Board of Bar Examiners,* 353 U.S. 232]; and the single conviction might not of itself have resulted in a recommendation against naturalization, nevertheless, when taken together, they *probably would have led to further investigation and discovery of defendant's Communist Party membership and activities.* When considered in that light, the materiality of the question on the issue of good moral character increases. [Emphasis added.]

II

The Judgment of Denaturalization Is Independently Sustained By Petitioner's Fraudulent Concealment of His Communist Party Membership

The district court's judgment of denaturalization had two bases—concealment and misrepresentation in relation to petitioner's record of arrests; concealment and misrepresentation in relation to petitioner's Communist Party membership. The second ground, we submit, provides a sound and independent basis for sustaining the judgment below, irrespective of this Court's disposition of Point I, *supra.* Resolution of the issue discussed under Point II, we emphasize, does not depend in any way on the question whether a denaturalization complaint may embrace matters not covered by the affidavit of good cause.

Petitioner suggests (Brief, p. 5, n. 2) that, if this Court disagrees with the government on Point I, it remand the case to the court of appeals, which found it unnecessary to consider the legal effect of the second

category of concealment and misrepresentation. To be sure, this Court commonly remands to the court of appeals for consideration of issues not considered by that court. This practice, however, is far from an unvarying one (see, *e.g.*, *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 508, and *United Gas Co.* v. *Memphis Gas Div.*, 358 U.S. 103, 114); and there are persuasive reasons for believing that this "litigation had better terminate now", *O'Leary* case, *supra*, at 508.

These reasons are as follows. The evidence that petitioner was a member of the Communist Party and an active and vigorous exponent of Communism is overwhelming and uncontradicted (see the Statement, *supra*, pp. 10-14), and is reflected in explicit findings of the district court (R. 81, 84-85). Petitioner's argument to the court of appeals on this phase of the case was strictly a legal one, *i.e.*, that this issue is controlled by this Court's decisions in *Nowak* v. *United States*, 356 U.S. 660, and *Maisenberg* v. *United States*, 356 U.S. 670. Petitioner has made no effort to challenge the evidentiary basis of the district court's findings as distinguished from their legal significance or effect. The court of appeals stated in its opinion (R. 97):

> * * * it is unnecessary for us to consider whether, as the defendant urges, the findings of the district court as to his concealment of his membership in the Communist Party and as to his lack of attachment to the principles of the Constitution and his disposition toward the good order of the United States can stand in the light of the decisions of the Supreme Court in Nowak v. United States,

1958, 356 U.S. 660, and Maisenberg v. United States, 1958, 356 U.S. 670, which were handed down after the district court entered its judgment in this case.

We believe, in short, that there can be no dispute as to the underlying facts and that the question narrows to the legal issue whether this case is controlled by *Nowak* and *Maisenberg*, as petitioner argued below, or whether it is significantly different from those cases.[19] Certainly, a determination as to the reach and applicability of this Court's prior decisions is one which may appropriately be made by this Court, at least where, as here, the determination does not involve the burdens of canvassing and assessing a voluminous record. This case, we believe, is one in which a remand "would be both unnecessary and dilatory" and in which the Court "could hardly be aided by a further examination of the record by the Court of Appeals," *United Gas Co.* v. *Memphis Gas Div., supra*, 358 U.S. at 114.

On the merits this case, in our view, cannot be deemed to fall within *Nowak* or *Maisenberg*. In each of those cases, the charge of fraud stemmed from the defendant's allegedly false answer to the second part of question 28 on the preliminary naturalization form:

> 28. Are you a believer in anarchy? . . . Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? . . .

[19] Although petitioner's opening brief in this Court is not addressed to this issue, counsel may, of course, deal with the matter in a reply brief.

Nowak, 356 U.S. at 663-665; *Maisenberg*, 356 U.S. at 672.[20] The defendant in each case answered "No" to each part. The government contended, and the lower courts in each case had held, that the defendant should have answered "Yes" to the second part of the question because, at the time of his naturalization, (1) the defendant was a member of the Communist Party, (2) the Party taught "the overthrow of existing government," and (3) the defendant was aware of this Party teaching. This Court held, however, that the second part of the question, in its context and in the context of the times in which it was answered, could well be interpreted as requiring disclosure only of membership in anarchistic organizations; it accordingly concluded that the second part of the question was "too ambiguous" to sustain the fraudulent procurement charge based on the defendant's membership in the Communist Party. *Nowak*, 356 U.S. at 664-665; *Maisenberg*, 356 U.S. at 672.

The instant case does not turn on the clarity of question 28, for petitioner was also asked, in his naturalization proceedings, to name all of the organizations to which he belonged and to state whether he believed in Communism (*supra*, pp. 7-8). The inescapable import of his responses, stating that the only organization to which he belonged was a fraternal benefit society

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[20] In *Maisenberg*, an alternative basis of the judgment of denaturalization was that the defendant had falsely stated at the time of her naturalization that she was attached to the principles of the Constitution (356 U.S. at 671-672). This Court found it unnecessary to reach this aspect of the judgment because of its determination that the defendant had not been shown to be lacking in such attachment "as an objective matter" (356 U.S. at 672, n. 3).

which he named and that he did not believe in Communism (*supra*, pp. 7-8), was that he was not a Communist or a Communist Party member. The responses were unmistakably false; the uncontradicted evidence is that for years prior to and subsequent to his naturalization he was an active and ardent Party member, officer, and leader, holding numerous highly responsible posts in the Party hierarchy (*supra*, pp. 10-14). The district court specifically found, "beyond all reasonable doubt," that petitioner deliberately and willfully concealed that at the time of his naturalization he was "an active member, officer and full-time paid functionary of the Communist Party of the United States" (R. 81).

That the concealment of his membership in the Party and adherence to its tenets was material is plain under the test of materiality previously discussed (*supra*, pp. 27-35). Had petitioner revealed his membership in the Party, it is evident that a path of significant further inquiry would have been opened to the Immigration and Naturalization Service and the naturalization court. For example, it would have been open to them to inquire into how "meaningful" his membership was. Cf. *Rowoldt* v. *Perfetto*, 355 U.S. 115, 120. If it appeared, for example, from their investigation that his membership was substantially lacking in any "'political' implications" (*Rowoldt, supra*, at 120), or that his joining was merely the result of economic desperation (*id.* at 117-118), it might very well be that his petition for naturalization would have been granted notwithstanding his Party membership. On the other hand, if further inquiry had uncovered (as

it doubtless would have), the fact that petitioner was, and had been for years, an active and zealous member, officer, and full-time Party functionary, indeed one of the leaders in the Party hierarchy, the result obviously might well have been otherwise.

Petitioner, as an applicant for the "high privilege" of citizenship, of course bore the burden of proving his eligibility. *United States* v. *Schwimmer*, 279 U.S. 644, 649-650; *United States* v. *Manzi*, 276 U.S. 463, 467; *United States* v. *Macintosh*, 283 U.S. 605, 615-616. That burden would have been a severe one once the character of his membership in the Party and the extent of his commitment to its tenets and ideology were discovered. Whether the Communist Party in 1940, when petitioner was naturalized, urged and advocated the violent overthrow of this government, and petitioner, as a knowledgeable member of the Party, knew of and endorsed such advocacy, would not have been the sole, or indeed the most important, question which the naturalization court would have been required to decide in determining whether petitioner had proved himself eligible—though it would certainly have been a legitimate question, and one which the court might well have resolved against him. Cf. *Schneiderman* v. *United States*, 320 U.S. 118, 153. A court of naturalization might legitimately conclude that an applicant for citizenship was lacking in attachment to the principles of the Constitution without finding that he actively urged their forcible destruction.

We are not arguing that if petitioner had disclosed his Party membership his application for citizenship

would *necessarily* have been denied. What we do say is that his membership, particularly because of the clear relevance of the facts which would have been discovered as a result of the inquiry which would have ensued had he not concealed it, was in itself a highly material fact. The proof that he concealed it was, as we have said, overwhelming and undisputed. On this ground alone, therefore, the judgment of denaturalization was both warranted and required. Cf. *Sweet* v. *United States*, 211 F. 2d 118, 120 (C.A. 6), certiorari denied, 348 U.S. 817.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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SEPTEMBER 1960.

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